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ZI PUBLICATIONS SDN BHD & ANOR v. JABATAN AGAMA ISLAM SELANGOR & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH J
[JUDICIAL REVIEW NO: 25-154-07-2012]
B 14 DECEMBER 2016

ADMINISTRATIVE LAW: *Judicial review – Validity of legislation – Application to declare s. 16 of Syariah Criminal Offences (Selangor) Enactment 1995 null and void for being unconstitutional – Validity of legislation already decided by*
C *Federal Court – Whether court bound by decision of Federal Court*

The first applicant was the publisher of a book entitled 'Allah, Kebebasan dan Cinta: Keberanian untuk Menyelaraskan Kebebasan dengan Iman' ('the book'). Armed with a search warrant, the first respondent raided the
D first applicant's premises and seized 180 copies of the book on the ground that it was 'a religious publication contrary to Islamic law', an alleged breach of s. 16(1)(a) or (b) of the Syariah Criminal Offences (Selangor) Enactment 1995 ('the Enactment'). The second applicant was arrested and taken to the third respondent's office where a statement was recorded from him. He was then produced before a Syariah Lower Court Judge for an appearance bond
E and/or bail to be secured in respect of his intended prosecution. The raid at the first applicant's premises and the second applicant's arrest was subsequently followed by an order issued by the Minister of Home Affairs under the Printing Presses and Publications (Control of Undesirable Publications) (No 3) Order 2012, *inter alia*, banning the printing,
F importation, production, re-production, publishing, sale, circulation, distribution or possession of the book and its translated version. The applicants filed judicial review, seeking (i) a declaration that s. 16 of the Enactment was null and void; and (ii) consequential reliefs in the form of *mandamus*, prohibition, *certiorari* and damages to restrain further prosecution
G of the second applicant and for the return of books wrongfully seized by the respondents. The respondents raised a preliminary objection that the court had no jurisdiction to hear the application as the Federal Court, in *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener*) ('*ZI Publications*'s case') held that s. 16 of the Enactment
H was valid and not *ultra vires* the Federal Constitution. The applicants argued that (i) the decision in the *ZI Publications*' case concerned the Legislative power of the State of Selangor in enacting s. 16 of the Enactment; and (ii) the constitutionality of s. 16 of the Enactment, in the sense of whether it was consistent with the various provisions of the Federal Constitution, was not the issue at the Federal Court.

I

Held (allowing preliminary objection and dismissing applicant's application):

(1) It was clear that the Federal Court, in the *ZI Publications*' case, had discussed the validity of s. 16 of the Enactment and decided that the said section was valid and not *ultra vires* the Federal Constitution. Hence, the relief sought by the applicant had to be dismissed. (paras 28 & 29)

Case(s) referred to:

Berjaya Books Sdn Bhd & Ors v. Jabatan Agama Islam Wilayah Persekutuan & Ors [2014] 8 CLJ 51 HC ***(refd)***

City Growth Sdn Bhd & Anor v. The Government of Malaysia [2005] 1 LNS 193 HC ***(refd)***

Jabatan Agama Islam Wilayah Persekutuan & Ors v. Berjaya Books Sdn Bhd & Ors [2015] 3 CLJ 461 CA ***(refd)***

ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Intervener) [2015] 8 CLJ 621 FC ***(foll)***

Legislation referred to:

Administration of the Religion of Islam (State of Selangor) Enactment 2003, ss. 78(1), 79

Printing Presses and Publications Act 1984, s. 7(1)

Syariah Criminal Offences (Federal Territories) Act 1997, s. 13

Syariah Criminal Offences (Selangor) Enactment 1995, s. 16(1)(a), (b)

Syariah Criminal Procedure (State of Selangor) Enactment 2003, ss. 58(1), 64

For the applicant - Fahri Azzat, Farhan Haziq, Rafeeza, Surendren & Kiattilin; M/s Fahri & Co

For the 1st - 5th respondents - Naziah Mokhtar; State Legal Advisor

For the 6th respondent - Shamsul Bolhassan & Mohamad Rizal Fadzil; SFC

Reported by Najib Tamby

JUDGMENT

Hanipah Farikullah J:

Introduction

[1] The applicants filed for judicial review:

(i) for a declaration that s. 16 of the Syariah Criminal Offences (Selangor) Enactment 1995 ("the impugned section") is null and void; and

(ii) for various consequential reliefs in the form of *mandamus*, prohibition, *certiorari* and damages to restrain further prosecution of the second applicant and to require the return of books wrongfully seized by the respondents, all on the basis of the said s. 16.

The Parties

[2] The first applicant ("the company") is a company incorporated under the Companies Act 1965 and is wholly owned by Malaysian citizens. It is a publisher of books.

[3] The second applicant, Mohd Ezra bin Mohd Zaid ("Ezra") is the principal shareholder and a director of the company. The other shareholder and director is the second applicant's elder brother.

[4] The first respondent is the Selangor State Islamic Religious Affair Department ("JAIS") and is a department of the fifth respondent, the State Government of Selangor, responsible for Islamic affairs in that state. The second respondent is the highest ranking officer in the first respondent.

[5] The third respondent is the Selangor Chief Religious Enforcement Officer, an office that was established pursuant to s. 79 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ("Administration Enactment"). The function of the third respondent is to investigate offences under the Administration Enactment and/or "according to any other written law which establishes offences against the precepts of Islam in Selangor".

[6] The fourth respondent is the Chief Syarie Prosecutor for the State of Selangor, a position established in accordance with s. 78(1) of the Administration Enactment. The fourth respondent has powers exercisable at his discretion to institute, conduct or discontinue any proceeding for an offence before any Syariah Court in the State of Selangor.

[7] The sixth respondent is the Government of Malaysia, and is named as a party because the constitutionality of a law is being called into question.

The Background Facts

[8] The first applicant is a publisher of a book entitled "*Allah, Kebebasan dan Cinta: Keberanian untuk menyelaraskan kebebasan dengan iman*" ("the book").

(i) The book is 388 pages long and is in Bahasa Malaysia. It was translated from its English version which was published by the Random House of Canada, a member of The Random House of Canada Limited, Toronto with the title "*Allah, Liberty & Love: The Courage to Reconcile Faith and Freedom*". The book is an effort by the author to reconcile faith and freedom.

(ii) The English version of the book was first published on 14 June 2011 and has been circulating in the local market since sometime in June 2011.

(iii) On the other hand, the Bahasa Malaysia version was published in May 2012 and was circulated in the local market at least since 19 May 2012.

[9] The applicants averred that on 29 May 2012 based on a search warrant dated 28 May 2012 that was allegedly due to a "religious publication contrary to Islamic Law" which was said to be in breach of s. 16(1)(a) or (b) Syariah Criminal Offences (Selangor) Enactment 1995 ("Criminal Enactment"), the employee, officer and/or agent of the first respondent had:

(i) raided, searched, seized and confiscated 180 copies of the book from the office of the first applicant at Be-2-19, Merchant Square, Jalan Tropicana Selatan 1, PJU 3, 47410 Petaling Jaya, Selangor ("the raid");

(ii) Subsequently, the first to third respondents, through their employee, officer and/or agent arrested the second applicant who is the director of ZI Publications, took him to the Selangor Islamic Religious Department at Level 4, Bangunan Sultan Idris Shah, Persiaran Majid, Seksyen 5, 40000 Shah Alam, Selangor Darul Ehsan and subsequently to the Syariah Lower Court in Shah Alam (Mahkamah Rendah Syariah Bandaraya Shah Alam) at Persiaran Masjid, Seksyen 5, 40000 Shah Alam, Selangor Darul Ehsan and allegedly imposed bail and/or obtained a "bond for appearance" ("appearance bond") for the purposes of prosecution in the Syariah Court on or before 60 days from 29 May 2012 under s. 64 of the Syariah Criminal Procedure (State of Selangor) Enactment 2003 ("Enactment Procedure 2003");

(iii) When the second applicant intended to leave the said premises, the third respondent (through himself or through his agent, employee and/or servant) restricted him and informed the second applicant that pursuant to search warrant dated 28 May 2012, the second applicant was required to follow the third respondent to his office; and

(iv) The second applicant had co-operated and followed the instructions of the third respondent *inter alia*, that he was not given the opportunity to obtain legal advice at the time.

[10] Subsequently, the second applicant was arrested by the third respondent (through himself or through his agent, employee and/or servants) and forced to follow the third respondent (through himself or through his agent, employee and/or servants) to his office where, *inter alia*, a statement was obtained from the second applicant.

[11] The second applicant was detained in the third respondent's office for more than four hours, approximately up to 3.30pm, where a statement was obtained from him and only then was he brought before a Syariah Lower Court Judge at 4pm for an appearance bond and/or bail to be fixed. The second applicant was only released from being arrested and detained upon payment of the appearance bond and/or bail, which was approximately around 5pm.

[12] In this present case, the applicants contended that the first to third respondents, through their agent, employee and/or servant, had acted in bad faith and maliciously when they made the second applicant wait until it was the end of the working day for the first applicant and Syariah Lower Court in Shah Alam, placing the second applicant in a state of uncertainty on whether he will be prosecuted, causing him to be detained overnight (due to the fact that the bail was unable to be paid into special bank account pursuant to the procedures set by the third respondent which was only decided upon at or about 4.15pm, which was 15 minutes before the nearest branch of the bank, CIMB Bank Berhad, closed) or released - all of the following was done with the intention to cause him mental distress, agony and torture. They had

also questioned and investigated employees of third parties who shared the same office as the first applicant who were present at the premises when the search was conducted.

[13] On 31 May 2012, the first respondent had subsequently issued an order requiring the attendance of witnesses to give evidence pursuant to s. 58(1) Enactment Procedure 2003 dated 31 May 2012, *inter alia*, against the employees of the third parties Ertiena Eliena binti Paharudin and Masrum bin Dayat.

[14] After two weeks of circulation of the translated version of the said book, the Minister of Home Affairs issued Printing Presses and Publications (Control of Undesirable Publications) (No. 3) Order 2012 ('the order") on 24 May 2012 and published it in the Government Gazette on 29 May 2012.

[15] The order declares that the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of the said book and its translated version was absolutely prohibited throughout Malaysia ("the ban"), without giving any grounds for this ban except for describing the book as being prejudicial to morality and public order.

[16] The applicants contended that the first applicant was not given an opportunity to be heard and to give its views before the said Minister made the order causing the ban.

[17] As a result of the ban the first applicant applied for a judicial review against the Deputy Minister of Home Affairs, Minister of Home Affairs and the Government of Malaysia to challenge the order made by the said Minister which banned the said books in the matter of Kuala Lumpur High Court Application for Judicial Review No. R2-25-153-07-2012.

[18] Leave for judicial review was granted and the substantive application was heard before Justice Zaleha bt Yusof (now JCA) in the High Court and the court granted the remedies sought by ZI Publication Sdn Bhd only in so far as it affected the Malay translation of the Publication.

[19] Unsatisfied with the High Court's decision, the respondents therefore appealed to the Court of Appeal on 2 October 2013. The Court of Appeal dismissed the respondent's appeal on 13 January 2015.

[20] The respondents then subsequently applied for leave to appeal to the Federal Court. The said application was heard on 2 February 2016 and leave was granted on only one question that is "Whether the prohibition of the translated version under s. 7(1) of the Printing Presses and Publications Act 1984 that has been quashed in the circumstances where the prohibition of the original version remains in force is valid in law?"

[21] Another individual professing the religion of Islam was also subjected to prosecution by the Islamic authorities of the Federal Territory of Kuala Lumpur. Nik Raina binti Nik Abdul Aziz was a manager of a company that

sold books. The book was found at the bookstore, and she was the highest ranking Muslim employee at the store. She was therefore charged under the equivalent provision to s. 16 in the Federal Territories, namely s. 13 of the Syariah Criminal Offences (Federal Territories) Act 1997.

[22] Her challenge to this court against similar actions taken against her by the authorities was successful, in a decision upheld by the Court of Appeal. The decisions are reported at:

(i) *Berjaya Books Sdn Bhd & Ors v. Jabatan Agama Islam Wilayah Persekutuan & Ors* [2014] 8 CLJ 51; [2014] 1 MLJ 138 HC; and

(ii) *Jabatan Agama Islam Wilayah Persekutuan & Ors v. Berjaya Books Sdn Bhd & Ors* [2015] 3 CLJ 461; [2015] 3 MLJ 65, CA ("the *Berjaya Books* case").

[23] The applicants submitted that this court is bound by the decision of the Court of Appeal in the *Berjaya Books* case, and should follow it in allowing the application in this matter.

Preliminary Objection

[24] Learned Senior Federal Counsel contended that the High Court has no jurisdiction to hear the applicants' application for judicial review ("the application") following the decision of the Federal Court in *ZI Publications Sdn Bhd & Anor v. Kerajaan Negeri Selangor; Kerajaan Malaysia & Anor (Intervener)* [2015] 8 CLJ 621; [2016] 1 MLJ 153 ("*ZI Publications*").

[25] On the contrary, learned counsel for the applicants submitted as follows. The decision in the Federal Court in *Zi Publications* case only concerns the legislative power of the State of Selangor in enacting the impugned section. The constitutionality of the impugned section, in the sense of whether or not it was consistent with the various provisions of the Federal Constitution, was not in issue in the Federal Court.

[26] In support of his contention, learned counsel for the applicants referred to the following part of the Federal Court's judgment:

> Thus, the SSLA was acting within its legislative power in enacting the impugned section. It is an offence against the precepts of Islam and precepts of Islam is not found in the Federal List. In consequence, there is no merit in the petitioners' argument that in enacting the impugned section, the SSLA was in fact enacting on a matter in the Federal List.
>
> Based on the above, we find that the impugned section enacted by SSLA clearly falls within the scope of precept of Islam. It is not a matter included in the Federal List and the punishment imposed is within the limit set by s. 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965. The impugned section is therefore valid and not *ultra vires* the Federal Constitution.

[27] Since the applicant challenged the constitutional validity of s. 16 of the Syariah Criminal Offences (Selangor) Enactment 1995 (the impugned section), I consider it is necessary to reproduce the same:

16. Religious publication contrary to Islamic law.

(1) Any person who:

(a) prints, publishes, produces, records or disseminates in any manner any book or document or any other form of record containing anything which is contrary to Islamic law; or

(b) has in his possession any such book, document or other form of record for sale or for the purpose of otherwise disseminating it,

Shall be guilty of an offence and shall be liable on conviction to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(2) The Court may order any book, document or other form of record referred to in subsection (1) to be forfeited and destroyed notwithstanding that no person may have been convicted of an offence in connection with such book, document or other form of record.

[28] It is important to note that the Federal Court in the case of *ZI Publications inter alia* discussed the validity of s. 16 of the Syariah Criminal Offences (Selangor) Enactment 1995 (the impugned section) and held as follows:

[27] We have no reasons to depart from the previous decisions of this court in the above two cases. In the present case, the purpose of the SSLA in enacting the impugned section is clear, to control religious publication which is contrary to Islam. It is also a measure to prohibit the dissemination of any wrongful belief and teaching among Muslims, through publication of any book or document or any form of record containing anything which is contrary to Islamic law. What is contrary to Islamic law is without doubt against the precepts of Islam. Thus, the SSLA was acting within its legislative power in enacting the impugned section. It is an offence against the precepts of Islam and precepts of Islam is not found in the Federal List. In consequence, there is no merit in the petitioners' argument that in enacting the impugned section, the SSLA was in fact enacting on a matter in the Federal List.

[28] Based on the above, we find that the impugned section enacted by SSLA clearly falls within the scope of precept of Islam. It is not a matter included in the Federal List and the punishment imposed is within the limit set by s 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965. The impugned section is therefore valid and not *ultra vires* the Federal Constitution.

Third Issue

[29] The third issue raised was whether Parliament's power to enact law in relation to matters in the State List can only be exercised in the circumstances set out in arts. 76(1)(a), (b) and (c) of the Federal Constitution. The said Article read as follows:

76(1) Parliament may make laws with respect to any matter enumerated in the State List, but only as follows, that is to say:

(a) for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member; or

(b) for the purpose of promoting uniformity of the laws of two or more States; or

(c) if so requested by the Legislative Assembly of any State.

[30] In light of our conclusion on the first and second issue, we are of the view that there is no real necessity to deal with the third issue. The arguments raised on the third issue was purely academic in nature and answering it would not affect the position of the parties or would not have any bearing in the outcome of this petition.

[31] In conclusion we wish to highlight that a Muslim in Malaysia is not only subjected to the general laws enacted by Parliament but also to the state of religious nature enacted by Legislature of a State. This is because the Federal Constitution allows the Legislature of a State to legislate and enact offences against the precepts of Islam. Taking the Federal Constitution as a whole, it is clear that it was the intention of the framers of our Constitution to allow Muslims in this country to be also governed by Islamic personal law. Thus, a Muslim in this country is therefore subjected to both the general laws enacted by Parliament and also the State laws enacted by the Legislature of a State.

[32] For the above reasons, we hold that the impugned section as enacted by the SSLA is valid and not *ultra vires* the Federal Constitution. The petition is dismissed.

[29] Based on the above passage of the judgment, it is clear that the Federal Court had decided that s. 16 of the Syariah Criminal Offences (Selangor) Enactment 1995 is valid and not *ultra vires* the Federal Constitution. Hence the relief sought by the applicant is dismissed.

Enforcement Power

[30] In any event, the relief sought by the applicant relates to the enforcement powers of the religious enforcement officers. Referring to the High Court decision in *City Growth Sdn Bhd & Anor v. The Government of Malaysia* [2005] 1 LNS 193; [2006] 1 MLJ 581, the Federal Court in the case of *City Growth* held that:

[12] Looking at the order of the Deputy Public Prosecutor as well as the provision of s. 50(1) of AMLA, I am of the view that the order of the Deputy Public Prosecutor is not reviewable under O. 53 of the RHC. To me, s. 50(1) of AMLA is part and parcel of the investigation process into an offence under s. 4(1) of AMLA. It appears that in order to facilitate the investigation into the offence of money laundering, the law has provided with the Public Prosecutor the power to assist the investigating officer. Clearly, s. 50(1) of AMLA was enacted to enable the Public Prosecutor or his Deputy to make an order of seizure of movable properties in the possession of the financial institutions by ordering the

financial institutions not to part, deal in, or otherwise dispose of such property or any part of it until the order is revoke or varied. Thus, by issuing the said orders the Deputy Public Prosecutor was merely exercising a function under AMLA.

[13] It has been said before that not all decisions and action of a public officer is reviewable by the court. In *R v. Sloan* [1990] 1 NZLR 474, Justice Hardie Boys said:

> ... it is not every decision made under statutory authority that is subject to judicial review. A decision must go beyond what is merely administrative or procedural … or the exercise of a function rather than a power … Quite plainly, the conclusions reached by the inspector here are of this kind and so are not reviewable. To hold otherwise would, as Mr Neave submitted, open up the investigation process of all law enforcement agencies to constant judicial review; and that cannot have been the intention of Parliament.

[14] Similarly, in *Ahmad Azam bin Mohamed Salleh & Ors v. Jabatan Pembangunan Koperasi Malaysia & Ors* [2004] 4 MLJ 86, I held that the public officers exercising a function under the Cooperative Societies Act 1993, is not reviewable under O. 53 of the RHC.

[15] Likewise in this case, the order of the Deputy Public Prosecutor under s. 50(1) of AMLA is also not reviewable. This must be so, otherwise if all decisions and action of public authority of this nature are amendable to court's review, then the government machinery may not be able to function smoothly. The investigation process of all law enforcement agencies will be open to constant judicial review. To borrow the words of Justice Hardie Boys in *R v. Sloan* 'that cannot have been the intention of Parliament'.

[16] It is submitted by learned counsel for all applicants that the issuing of the s. 50(1) order, the Deputy Public Prosecutor has crippled their business and has further failed to appreciate that the said orders would subject them and its directors and officers to liabilities resulting from their inability to utilise its funds. But as stated earlier the s. 50(1) order is to secure the evidence for the purpose of criminal prosecution under s. 4(1) of AMLA. It is not an administration decision but a decision in relation to criminal investigation. Thus, the right of all applicants in the four cases lies in the criminal, as well as civil law and not in an administration action. The Deputy Public Prosecutor was performing his duties under s. 50(1) of AMLA and cannot be made accountable by way of judicial review.

Conclusion

[31] Based on the above reasons, the preliminary objection is allowed and hence encl. (1) is dismissed with no order as to costs.